Pietrovito

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cubic Field Services, Inc.

File: B-247780

Date: June 17, 1992

Sheldon I. Matzkin, Esq., and Gerson B. Kramer, Esq., Wachtel, Ross & Matzkin, for the protester.
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Damon A. Martin, Esq., and Douglas P. Larsen, Jr., Esq., Department of the Navy, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated best value procurement for a cost reimbursement contract for a level of effort technical services contract, in which the agency's technical evaluators ranked the protester's and awardee's technical proposals as essentially equal, the contracting officer reasonably found that the protester's insufficiently supported offer of a cost decrement and overall cost cap in its second best and final cost proposal presented significant performance risks, such that the awardee's lower risk offer was the best value to the government, given that the protester's offer would only be low cost if the cost caps were accepted.

DECISION

Cubic Field Services, Inc. protests the award of a contract to Loral Training and Technical Services under request for proposals (RFP) No. N00123-91-R-0101, issued by the Department of the Navy, for operation and maintenance services for the tactical air combat training system/electronic warfare range at the Marine Corps Air Station, Yuma, Arizona. Cubic argues that the Navy improperly rejected its offered cost cap and that it is entitled to award as the technically equal, low cost offeror.

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We deny the protest.[1]

The RFP contemplated the award of a cost-plus-award-fee contract for a base and 4 option years to perform operation and maintenance services, as set forth in a detailed performance work statement. Offerors were informed that award would be made to the responsible offeror whose conforming offer was the most advantageous to the government, price and other stated factors considered. Technical evaluation factors and subfactors were stated in the RFP, which provided that technical factors were substantially more important than cost.

The solicitation stated man-hour levels of effort and other direct costs, such as costs for spare parts, that offerors were required to use in preparing their cost proposals. Offerors were informed that a cost realism analysis would be performed to:

> "(1) verify the offeror's understanding of the requirements;
> (2) assess the degree to which the cost proposal reflects the approaches and/or risk that the offeror will provide the services for the offered costs; and
> (3) assess the degree to which costs included in the cost proposal accurately represent the work effort included in the technical proposal."

The RFP warned that "[a]ny inconsistency, whether real or apparent between promised performance and cost/price, must be explained in the cost proposal volume (Note - must also be explained in the technical proposal without giving cost information)," and that unrealistic costs would be considered in the agency's technical evaluation. Offerors were also cautioned to explain "any unusual bidding practices . . . [to] enable the [agency] to determine that acceptance of that offer will not create undue risk to the [g]overnment," and that:

> "Cost information which assumes knowledge of future events (such as discounts for attrition) shall not be included. If any portions of the cost proposal are determined by the [g]overnment to do this, the costs shall be ignored by the evaluators."

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[1]Portions of the protest record are subject to a General Accounting Office protective order to which counsel for Cubic and Loral have been admitted. Our decision, which is based upon protected confidential information, is necessarily general.

Finally, the RFP provided:

> "Offerors are reminded to submit realistic prices. In the event a contractor chooses to propose a rate or dollar amount for G&A [General and Administrative expenses], overhead, fringe benefits or ODCs [other direct costs] that is lower than anticipated actuals, the [g]overnment reserves the right to cap these costs in the contract. Detailed information must be provided with the proposal which enables the [g]overnment to determine and evaluate each and every element that comprises the category in question."

The Navy received five offers,[2] including those of Cubic and Loral. Discussions were conducted with all offerors and BAFOs received. After the receipt of initial BAFOs, the Navy amended the RFP to further define the required direct labor level of effort, to include a level of effort clause and to revise the contract period of performance. A second round of BAFOs was requested and received from all offerors. Cubic received the best normalized technical point score of 60 points, while Loral received 57.4 points.

The Navy's technical evaluators found that Cubic's and Loral's technical proposals contained no notable weaknesses and exceeded the government's minimum requirements in many areas, and that the firms' proposals were essentially technically equal. The evaluators recommended that award be made to the offeror whose cost proposal represented the best value to the government.

The Navy, in its cost evaluation, found that Cubic, for the first time in its second BAFO cost proposal, had proposed a "management decrement" for the base and option years, which was offered as a "not to exceed" amount.[3] Cubic's BAFO stated that this reduction in proposed costs was based upon the firm's "concept of operations" that would permit less costly performance of the contract requirements. The contracting officer rejected Cubic's proposed cost decrement

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[2]One offeror initially submitted two offers in response to the RFP but did not submit its alternate offer in response to the request for second best and final offers (BAFO).

[3]The Navy apparently accepts Cubic's characterization of its "not to exceed" cost decrement as a binding cost cap, presuming it were accepted by the Navy. From our review of Cubic's BAFO, we are unsure that this "not to exceed" amount is a legally binding cost cap. Given our decision that the agency's award selection of Loral's offer was reasonable, we do not address this concern.

because "[c]ost information was not provided which would support [the] proposed cost decrement" and the "[p]roposed cost decrement is based on performance/services rendered in future contract performance, [and] [i]nformation was not provided to support future contract savings."

The Navy made various cost realism adjustments in the offerors' cost proposals. Loral's second BAFO's proposed costs of $8.5 million were adjusted up to $8.6 million, while Cubic's proposed costs of $8.4 million were adjusted to $8.9 million.[4] Most of the increase in Cubic's proposed costs reflected the agency's disregard of Cubic's proposed cost decrements.[5] Award was made to Loral as the technically equal, low cost offeror, and this protest followed.

Cubic argues that the Navy unreasonably disregarded its proposed management decrements, as expressed in cost caps, and that it is entitled to award as the technically equal, low cost offeror since its cost caps should have been considered. The Navy responds, citing RCA Serv. Co., B-197752, June 11, 1980, 80-1 CPD ¶ 407, that it was justified in evaluating Cubic's total proposed costs, without consideration of the cost caps, because of the significant performance risks presented by Cubic's offer to cap its overall costs. That is, in the agency's view, Cubic will be motivated under its proposed management decrements to curtail its contract level of effort in order to avoid exceeding its cost caps.

Cubic disagrees that its offer to cap its total reimbursable costs presents any performance risk, arguing that the Navy's technical evaluators found no significant risk in its proposal. Cubic contends, citing Robocom Sys., Inc., B-244974, Dec. 4, 1991, 91-2 CPD ¶ 513, that "[a]s a matter of law, the argument of increased risk performance through the acceptance of a cost cap ordinarily does not prevail."

It is true that the proposal of a cap on reimbursable costs is generally sufficient to preclude an upward cost adjustment pursuant to a cost realism analysis. See Resource Consultants, Inc., B-245312.2, Mar. 23, 1992, 92-1 CPD ¶ 301. This is so because capping proposed costs shifts the

[4]These figures represent evaluated costs excluding the phase-in costs and award fees.

[5]The agency made some other minor cost realism adjustments to Cubic's cost proposal, which Cubic does not protest.

risk of cost overruns to the contractor, so the government will not incur costs above those proposed.[6] Id.

Here, however, the real essence of the Navy's concerns regarding Cubic's BAFO offer to cap costs was not with determining Cubic's probable costs of performance or whether the government might be expected to pay cost overruns,[7] but that Cubic's offer to cap its total contract costs based upon an insufficiently explained "management decrement" created a significant risk that Cubic was not offering to provide the necessary level of effort to satisfactorily perform the contract.[8]

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[6]We are aware of no legal proscriptions on capping individual elements of costs or even total contract costs.

[7]We disagree with that part of the Navy's argument that suggests that a definitive cost cap can be rejected or ignored in an agency's cost realism evaluation simply because insufficient cost information is provided to support the reasonableness of the cap. While an agency generally cannot ignore an offered cost cap in its cost realism evaluation, the reasonableness of the cost cap may properly be considered in the agency's technical evaluation or during the determination of an offeror's responsibility. See Robocom Sys., Inc., supra. The risk of poor performance at little or no profit is, in general, a legitimate concern in the evaluation of proposals. See Ferranti Int'l Def. Sys., Inc., B-237555, Feb. 27, 1990, 90-1 CPD ¶ 239.

[8]The agency's concerns with Cubic's performance risk and their conclusion that Cubic should not be selected for award because of its high performance risk are only expressed in the agency's report on the protest and are not referenced in any of the agency's contemporaneous evaluation and award selection documents. In determining whether an agency's selection decision is supportable, we consider the entire record, including statements and arguments made in response to a protest. See DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575. However, we accord greater weight to contemporaneous documentation than to statements and documents that were prepared in response to protest contentions. Id. Here, the issue of Cubic's performance risk has been fully argued and briefed by the parties, and, as noted below, we find, even according less weight to the agency's statements in response to Cubic's protest contentions, that the agency's evaluation and award selection decision were reasonable.

The RFP, as noted above, sought cost proposals to perform various operation and management services. While estimated levels of effort and required personnel qualifications were stated in the RFP to allow for a common evaluation of proposals, the actual level of effort and expertise necessary to successfully perform the contract work will fluctuate depending on the agency's future needs.

Cubic, for the first time in its second BAFO, proposed an overall cost cap based upon the firm's "concept of operations" that would allow it to perform the contract requirements at less cost. Cubic did not offer to reduce or cap its direct or indirect cost rates; rather, Cubic's proposed reduction in (and cap of) overall costs reflected Cubic's judgment (as based on its experience and technical approach) that it can perform the contract with less man-hours of effort than that estimated by the agency because of its experience and creative ideas to more efficiently accomplish the work.

The Navy found that Cubic provided little information in its technical or cost BAFO to demonstrate the reasonableness of the firm's view that it could satisfactorily perform the contract work with less man-hours of effort than estimated by the government.[9] Instead, Cubic's "explanations" in its cost BAFO of its management decrement consisted of little more than promises to economically perform the contract work. Ultimately, the agency was essentially unsure as to how Cubic could satisfactorily perform the contract work with less man-hours of effort than estimated by the RFP and concluded that the cost cap therefore created a significant risk that Cubic would not provide the man-hour level of effort necessary to satisfactorily perform the contract. In the absence of a sufficient explanation or assurance from Cubic regarding how it could perform the contract with less man-hours than estimated by the agency,[10] the Navy was reasonably concerned that a significant risk existed that Cubic would curtail its contract effort to avoid exceeding

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[9]The man-hours estimated in the RFP formed the basis for the cost evaluation; an offeror who proposed less man-hours than specified in the RFP would properly have been considered unacceptable.

[10]An agency is not obligated to reopen negotiations so that an offeror may remedy defects first introduced in its BAFO since the offeror assumes the risk that changes in its final offer might raise questions about its ability to meet the solicitation requirements. See Ferranti Int'l Def. Sys., Inc., supra.

the cost ceiling.[11] In this regard, the Navy notes that the reason it made this a cost reimbursement contract and estimated a common level of effort in the RFP for evaluation purposes was because of the uncertainty in how much effort that it would take to successfully accomplish the contract work.

Cubic notes that its technical proposal was not found to contain any performance risk, which belies the current agency position regarding performance risk. While it is true that the Navy's technical evaluators did not find any performance risk in Cubic's technical proposal, Cubic's cost decrements and caps were only contained in the firm's second BAFO, which the technical evaluators did not access. Only the Navy's contracting officer had access to all of Cubic's proposal and evaluation information, and could evaluate the performance risk arising from Cubic's proposed cost decrement. The contracting officer's concerns regarding Cubic's performance risk if Cubic's cost caps were accepted undermined the high technical scores Cubic received from the technical evaluators, such that the contracting officer could reasonably find that Cubic's proposal, with the cost caps, was high risk and not the technical equal of Loral's. We note that the RFP expressly allowed cost proposals to be considered in evaluating technical risk.

Although Cubic argues, citing Robocom Sys., Inc., supra, that the imposition of a cost cap does not entail performance risk, we found in that case (also involving a competition for a cost reimbursement contract) that a firm's offer to cap its indirect burden rates, while reducing the agency's risk of cost overruns, increased the risk of

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[11]The Navy also contends that since the RFP contained the standard termination for default clause for cost reimbursement contracts, as set forth in Federal Acquisition Regulation § 52.249-6, the agency has no right to recover excess costs of procurement from Cubic, in the event that Cubic should refuse to continue performance after being reimbursed for its costs up to its cost cap. Cubic disagrees and cites General Dynamics Corp. v. United States, 229 Ct. Cl. 399, 409-410, 671 F.2d 474, 479-480 (1982), for the proposition that the government has the right to recover excess costs of procurement of a capped, cost reimbursement contract. In that case, unlike the circumstances presented here, the parties had negotiated special provisions in the cost reimbursement termination clause to provide the government with the right to recover excess procurement costs. We think that the contracting officer was reasonably concerned that the performance risks of Cubic's capped offer were increased by the use of the standard cost reimbursement termination clause in the RFP.

performance problems, which the agency could properly consider. Similarly, in RCA Serv. Co., supra, we found that the procuring agency properly considered the performance risk arising from the offer of an overall cost cap;[12] specifically, we noted that:

> "We cannot fail to recognize that RCA would have some incentive to control or reduce costs. Such an incentive usually is good. However, in this case RCA's effort might be directed toward minimizing its potential loss on the contract, resulting possibly in unacceptable performance. Consequently, we believe that RCA's cost ceiling proposal cast doubt on RCA's previously approved technical proposal because of the newly introduced reverse performance incentives, thus undermining the total quality of the RCA proposal."

Cubic further argues that its offered cost decrement and cap presented no performance risk because the agency was protected by the solicitation's provision for government monitoring of the contractor's performance.[13] However, as noted above, Cubic's second BAFO did not explain precisely how the offeror intended to perform the contract work at its reduced cost and the agency was unsure how Cubic could satisfactorily perform the contract work with less man-hours of effort than that estimated by the government. In the agency's view, the contract administration provisions for government monitoring did not obviate the performance risk inherent in Cubic's cost proposal; that is, that Cubic's offer presented a significant risk caused by reverse performance incentives. Thus, we find the agency's concerns

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[12]Cubic argues that our decision in RCA Serv. Co., supra, is not controlling because the agency in that case was conducting a cost comparison procurement under Office of Management and Budget Circular No. A-76 and was concerned with offerors "buying-in" and because RCA, unlike Cubic, had only offered to cap its base year costs and to negotiate the option years costs. Our decision in RCA Serv. Co., supra, was not restricted to, or limited by, these facts. Rather, we recognized that an agency could have valid concerns about obtaining satisfactory contract performance where an offeror's proposed overall cap on its reimbursable costs presented significant reverse performance incentives to control costs.

[13]An agency can reasonably conclude that an offeror's risk of performance could be administratively dealt with after contract award through government monitoring. See, e.g., Wyle Laboratories, Inc.; Latecoere Int'l, Inc., 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107.

are reasonably based and that it need not ignore its concerns about unsatisfactory contract performance because the agency could arguably control performance in contract administration. See Unisys Corp., B-231704, Oct. 18, 1988, 88-2 CPD ¶ 360 (agency reasonably found proposed warranty provisions did not obviate the offer's evaluated high performance risk).

Cubic also argues that the agency failed to evaluate its proposal in accordance with the stated evaluation scheme because, in Cubic's view, the RFP invited offers of cost caps and the Navy allegedly did not consider Cubic's cost cap. As noted above, the Navy did consider Cubic's offer of an overall cost cap and determined that the firm's offer, as capped, presented a high performance risk. Given this risk, the agency was not obligated to accept the offered cap.[14]

From our review of the record, we find reasonable the agency's conclusion that the insufficiently explained cost decrement and cap in Cubic's second BAFO cost proposal presented a significant risk of performance. The Navy's contracting officer considered Cubic's performance risk and, in effect, concluded that Cubic's proposal was not the technical equal of Loral's low risk proposal.[15] Under the circumstances, the agency could reasonably select Loral's lower-risk proposal as the most advantageous to the government, notwithstanding that Cubic's evaluated cost would have been slightly lower ($8.4 million against Loral's $8.6 million) if Cubic's cost caps had been accepted. See Ferranti Int'l Def. Sys., Inc., supra.

The protest is denied.

for James F. Hinchman
General Counsel

[14]On the other hand, if the agency were reasonably persuaded that Cubic's cost cap did not significantly increase performance risk, it could have accepted the cost cap.

[15]As noted above, the Navy's technical evaluators, who found Cubic's and Loral's proposals to be technically equal, were unaware of Cubic's proposed cost decrement in its second BAFO cost proposal.